Design Drywall Ltd., Inc., I.D. Drywall Ltd., Inc., and Ideal Drywall Company, a Single Employer and Alter Egos *and* The Carpenters District Council of Detroit and Southeastern Michigan, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. Case 7–CA–27822

January 30, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On February 8, 1990, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified below.

The Respondents contend in their exceptions that the carpenters on both residential and commercial projects were independent contractors rather than employees. For the reasons set forth by the judge, we agree that on commercial projects the carpenters were employees. Based on our review of the record, however, we are unable to determine the nature of the working relationship that the Respondents established with the carpenters who performed residential work during the relevant time period after the creation of Design Drywall in 1986, and we do not find that the evidence establishing the employee status of the commercial carpenters supports a similar finding with respect to residential carpenters. In this regard, we note that the only witness who testified about the working relationship between the carpenters and the Respondents was Novick. He claimed that when he started out in business doing residential work as Ideal Drywall in 1985, the carpenters with whom he dealt were independent contractors whose status never changed after the formation of Design Drywall. During his examination of Novick in an attempt to refute this claim, the General Counsel focused on examples of Novick's control over carpenters hired for commercial jobs after Design Drywall was created. The record contains few details of the nature of the carpenters' working relationship with Novick on residential projects after the creation of Design Drywall. In this regard, it cannot be ascertained from the record whether, after Design Drywall was established, Novick ran the residential projects in the same manner as the commercial projects or whether the residential projects continued to be run as they had been under Ideal Drywall. Under these circumstances, the record is insufficient to establish that the carpenters on residential projects were employees rather than independent contractors as alleged by the Respondents. Accordingly, we shall modify the judge's conclusions of law and recommended remedy and Order to limit the violation found to commercial projects.

AMENDED CONCLUSIONS OF LAW

The following shall be substituted for Conclusion of Law 4.

''4. By unilaterally modifying the terms of the collective-bargaining agreement with the Union and repudiating their obligation to pay the contractual wage rate and fringe benefits on commercial projects, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.''

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondents, for the period from September 3, 1987 (the beginning of the 10(b) limitation period), through August 1, 1988 (the expiration date of the 8(f) agreement), to make the employees whole for unpaid wages and reimburse them for any expenses ensuing from the failure to make the fringe benefit contributions, *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). This shall include reimbursing employees for any contributions they themselves may have made for the maintenance of any fund after the Respondents made the unilateral changes. *Concord Metal*, 295 NLRB 912 (1989).

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondents except to the judge's finding that they admitted to being a single employer. The Respondents admit ''that [Allen] Novick's three separately incorporated companies . . . are a 'single integrated enterprise' that is commonly owned and operated by Novick [and his wife].'' R. Br. at 7. On the basis of this admission, we agree with the judge that the Respondents constitute a single employer. See *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1120 (3d Cir. 1982) (the question in all single employer cases is whether two or more nominally independent enterprises in reality constitute only ''one integrated enterprise''). In light of this single employer finding, Members Devaney and Oviatt find it unnecessary to pass on whether the Respondents also constitute alter egos. For the reasons stated by the judge, Member Cracraft would find the Respondents were alter egos.

The Respondents also except to the judge's finding that G.C. Exh. 30 shows that some carpenter crew leaders received extra pay to be divided with labor helpers. We find merit in this exception. G.C. Exh. 30 is a payroll summary, prepared by the union auditor, reflecting the earnings received by carpenters and other drywall workers from either Ideal Drywall, Design Drywall, or I.D. Drywall. It does not indicate, and the record does not otherwise show, that some crew leaders received extra pay to distribute to their helpers. This error, however, does not affect our decision.

The Respondents, for the same period, must also make the withheld contributions to the fringe benefit funds, plus the contractually mandated liquidated damages for delinquent contributions, *American Thoro-Clean*, 283 NLRB 1107, 1109 (1987). Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. Any additional amount owed the fringe benefit funds shall be determined in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Design Drywall Ltd., Inc., I.D. Drywall Ltd., Inc., and Ideal Drywall Company, Dearborn Heights, Michigan, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Refusing to pay the contractual wage rate and fringe benefits on commercial projects as required by the 1987–1988 collective-bargaining agreement between M.C.C.A. and the Carpenters District Council of Detroit, AFL–CIO, during the period from September 3, 1987, until the expiration of the agreement on August 1, 1988.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to pay union wages and fringe benefits on commercial projects from September 3, 1987, to August 1, 1988, as required by our agreement with the Carpenters District Council of Detroit, AFL–CIO.

WE WILL NOT refuse to furnish relevant and necessary records requested by the Union for an audit to determine compliance with the agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL transmit the unpaid fringe benefits to the Union's benefit funds, plus the contractual liquidated damages, and make whole the employees in the following appropriate unit by paying their unpaid wages and reimbursing them for any expenses ensuing from our failure to pay the fringe benefits, plus interest, in the manner set forth in the remedy section of the decision:

> All drywall carpenters employed by Design Drywall, Ideal Drywall, and I.D. Drywall, excluding all other employees and supervisors as defined in the Act.

DESIGN DRYWALL LTD., INC., I.D. DRYWALL LTD., INC., AND IDEAL DRYWALL COMPANY

Dennis R. Boren, Esq., for the General Counsel.
Theodore R. Opperwall and *Carl Bloetscher III, Esqs*., of Detroit, Michigan, for the Respondents.
Frederick B. Gold, Esq., of Birmingham, Michigan, for the Union.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. This case was tried in Detroit, Michigan, on February 16–17, 1989. The charge was filed March 8, 1988 (amended March 28 and September 21, 1988) and the complaint was issued April 27 and amended November 21, 1988, and at the trial.

After operating nonunion over a year as Ideal Drywall, President Allen Novick formed a union company, Design Drywall, to bid on both union and nonunion drywall installation jobs. To avoid paying the contractual fringe benefits, he placed most of the employees on Ideal's payroll, transferring funds from Design to Ideal for piece-rate pay without any fringe benefits.

When the employer association terminated Design from membership, Novick activated a second nonunion company, I.D. Drywall, which he also operated from the same office. He used the same Design and Ideal employees, transferring funds from I.D. to Design and Ideal for their pay, without any fringe benefits.

Respondents Design, Ideal, and I.D. admit that they are a ''single integrated enterprise.''

The primary issues are whether the Respondents (a) unlawfully, without notice to the Union, modified terms of the union agreement by repudiating their obligation to make fringe benefit contributions for their employees and to pay the contractual wage rate for commercial work and (b) unlawfully refused to provide records for an audit, violating Section 8(a)(1) and (5) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondents, and Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent corporations, Design Drywall Ltd., Inc., I.D. Drywall Ltd., Inc., and Ideal Drywall Company, are con-

tractors in the construction industry, installing drywall at residential and commercial structures from their office in Dearborn Heights, Michigan. Respondent Design has been a member of the Michigan Carpentry Contractors Association (M.C.C.A.), whose members annually receive goods valued over $50,000 directly from outside the State. The Respondents admit, and I find, that they are an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, the Carpenters District Council of Detroit and Southeastern Michigan, United Brotherhood of Carpenters and Joiners of America, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Modified Terms of Union Agreement*

1. Operating business under three names

a. *As Ideal Drywall, beginning February 1985*

On February 5, 1985 (Tr. 8) President Allen Novick incorporated Ideal Drywall and began operating a small nonunion drywall installation business. He hired drywall carpenters at a straight piecework rate, paying no fringe benefits (Tr. 92). He was the sole supervisor and he sometimes worked alongside the crews (Tr. 25–26).

Novick permitted many of the drywall carpenters to select their own labor helpers, who were paid as low as $5 an hour and who were not shown on Ideal's payroll (Tr. 94–95).

There was no foreman on the job for quality control.

b. *As Design Drywall, beginning June 1986*

(1) Adoption of union agreement

On May 9, 1986 (Tr. 7) Novick formed a new corporation, Design Drywall. On June 10, 1986, on behalf of Design (G.C. Exh. 2A), he joined the Michigan Carpentry Contractors Association (M.C.C.A.) and signed a power of attorney in labor relations matters (G.C. Exh. 2B). The document appointed M.C.C.A. as Design's ''exclusive agent'' to ''negotiate and sign collective labor agreements with the Union, which agreements shall be binding on the undersigned for their duration.'' It concluded: ''This Power of Attorney shall continue until expressly revoked in writing.''

At the time, M.C.C.A. was a party to the Union's 1984–1987 residential construction agreement (G.C. Exh. 15), to which Design Drywall became bound as an 8(f) prehire agreement. *City Electric*, 288 NLRB 443 (1988) (employer signed letter of assent). The agreement provided for fringe benefits (consisting of health and welfare insurance, vacations and holidays, pension, and apprenticeship and training) and liquidated damages (collection charges) for delinquent payments. It also provided that any party performing work not covered by the residential agreement (such as ''funeral homes, clinics, restaurants, rest homes, nursing homes, stores or similar work traditionally done under the Commercial Agreement'') shall abide by the commercial agreement (see the 1987–1989 commercial agreement, G.C. Exh. 20, Tr. 248).

In 1987 the M.C.C.A.-union residential agreement was extended from August 1, 1987, to August 1, 1988 (G.C. Exh. 16), raising the journeyman base rate from $14.51 to $15.46 and the fringe benefits from $3.98 to $4.08 an hour (G.C. Exh. 22).

(2) Repudiation of contractual terms

(a) *Nonpayment of fringe benefits*

After adopting the union agreement on June 10, 1986 (through Design's power of attorney to M.C.C.A.), Design President Novick began operating the business under the name Design Drywall, submitting Design bids for drywall installation on both union and nonunion project (Tr. 132, 147, 156—contrary to his claim at Tr. 31). He expanded the business and hired a foreman, Glenn Pillow (Tr. 70). The auditor's summary (G.C. Exh. 30) shows that Pillow (a taper, Tr. 192) worked full time, being paid $26,420 during the remainder of 1986, $36,488 in 1987, and $37,632 in 1988 through August, the last month covered by the summary.

Under the union agreement, Novick initially paid the fringe benefits, but only to a few employees. When the auditor examined the records in July 1987 he found that Novick placed carpenter Jerry Dominic on the Design payroll (with fringe benefits) in June, Robert Atchley in July, Jimmy Sullins in August 1986, and Ted Carpenter in February 1987. Atchley remained on the Design payroll from July to November, but did not work after December 1986, when he was placed on the Ideal payroll, without benefits. (G.C. Exh. 30, Tr. 309.) By May 1987 Novick was paying fringe benefits only for Dominic (G.C. Exh. 22).

(Novick testified, Tr. 102, that he formed Design in May 1986 because Dominic—who was a ''flier,'' doing the work of ''two or three crews''—called him and said, ''Al, if you'll pay union I will go to work for you.'' The auditor's summary (G.C. Exh. 30) shows that Dominic had been working for Novick on Ideal's payroll for months before that. Concerning the three other employees on Design's payroll (Atchley, Carpenter, and Sullins), Novick testified (Tr. 105) that ''when I joined the union and we got a union job, I asked them if they'd go join the union and . . . . I asked them [if they wanted the benefits]. . . . I made the mistake of asking them.'')

President Novick continued to pay fringe benefits only for Dominic from June through October 1987, even though employees Carpenter and Sullins were on the Design payroll in June and July and also in October, along with employees Keith Hedger and Lloyd Scherdt (G.C. Exh. 30), working on an office building, a union commercial job (as discussed later).

Meanwhile, employees Carpenter and Sullins, as well as the other employees working on Design's jobs that did not require union employees, were placed on Ideal's payroll, with no fringe benefits.

Thus, to avoid paying fringe benefits to employees working on Design's nonunion jobs, President Novick placed the employees on nonunion Ideal's payroll. Without notice to the Union, he repudiated his contractual obligation to pay all employees the union scale and fringe benefits (G.C. Exhs. 15, 16) and paid them at a piece rate of 10 cents a square foot, without any fringe benefits and without any tax or other payroll deductions (Tr. 73–74, 91–92, 205). This required a transfer of funds from Design to Ideal.

In evidence are copies of 132 checks from Design to Ideal, dated from June 5, 1986, to November 23, 1988, each bearing the notation ''Consultant Fee'' or ''Consultant Fees'' (G.C. Exh. 4A). Novick admitted writing the Design checks to cover Ideal's payroll (Tr. 73, 147). He claimed, however, that he placed the consultant fee notations on the checks because his bookkeeper told him to do so ''to keep the checks separate from going into my personal income'' and having ''to pay personal taxes on it'' (Tr. 130, 150, 182). I discredit this implausible explanation, finding it to be a fabrication.

I find it obvious that the consultant fee notations were designed to conceal Novick's maneuver of avoiding the payment of fringe benefits to employees on Design's nonunion jobs by placing the employees on the nonunion company's payroll (that is, paying Design employees with Ideal checks or employing Ideal employees on Design's nonunion jobs).

(b) *Residential rates on commercial job*

President Novick testified that when he incorporated Design Drywall, ''I was going to try to get into commercial work'' (Tr. 103).

When called as an adverse witness, Novick admitted (Tr. 34) that his drywall work at the Concord Office Center project in Auburn Hills was a commercial job, his first nonresidential job (Tr. 184–185). Yet in October 1987, when the job began, he not ony failed to pay fringe benefits for four Design employees (Carpenter, Hedger, Scherdt, and Sullins as discussed above), but he paid them and employee Dominic (who was acting as foreman, Tr. 263) the lower residential wage rate and benefits instead of the commercial wage rate and benefits ($15.46 instead of $17.87 in wages and $4.08 instead of $5.80 an hour for fringe benefits). Throughout November he continued to pay the residential rate and fringe benefits (G.C. Exh. 22).

Finally, after Union Representative Charles Jackson visited the job on November 25, 1987, and discovered the violations of the union agreement (Tr. 263–267), Novick began in December 1987 paying the commercial wage rate and benefits. For November, he submitted the residential form 3020 (showing the $15.46 rate) to the Union's fringe benefit funds and paid the fringe benefits for that month. For December through February 1988 he submitted the commercial form 3010. Since then he has paid no fringe benefits except for employee Dominic's residential work in August and September 1988 (G.C. Exh. 22).

I discredit Novick's claim (when questioned later at the trial by the Respondents' counsel) that he was under the impression that the ''two-story'' office buildings (actually three stories, or two stories and a garage basement, Tr. 263, 334) were residential work (Tr. 75). These buildings had metal studs (Tr. 203, 271), whereas all his residential work had wood studs (Tr. 23), and there is nothing in the union agreements suggesting that construction of an office building could be considered residential work.

c. *As I.D. Drywall, beginning April 1988*

President Novick continued to operate as Design Drywall until March 1988 when M.C.C.A. (consisting of union contractors) terminated Design Drywall from membership. Meanwhile on August 26, 1987, anticipating ''union trouble,'' Novick incorporated a second nonunion company, I.D. Drywall, which he left dormant for the time being, except for bidding on two nonunion jobs (Tr. 9, 160, 163). As he explained at the trial, ''I just wanted to . . . avoid the Union from coming in and start picketing and raising hell with me'' (Tr. 155).

On March 25, 1988, the Union notified Novick, in part (G.C. Exh. 2C):

> This will acknowledge receipt of a letter informing us of the termination of your membership in the Michigan Carpentry Contractors Association and withdrawing its authority to act as your collective bargaining representative.
>
> Your company will, of course, continue to be bound by the current Collective Bargaining Agreement until it is terminated.

In April Novick, as president of the new nonunion company, activated I.D. Drywall and began doing business under that name, without notifying the Union. He hired no new employees, but used the same Ideal and Design employees, making no fringe benefits contributions except later for Dominic's work in August and September 1988.

In evidence are copies of 23 checks from I.D. Drywall to Ideal Drywall, dated from April 8, 1988, to January 27, 1989, all bearing the notation ''Consultant Fees,'' except one with no notation and one for ''Consultants'' (G.C. Exh. 4D, Tr. 154). Also in evidence are copies of 14 checks from I.D. to Design, dated from May 10, 1988, to January 27, 1989, all showing ''Consultant Fees'' (G.C. Exh. 4C, Tr. 151). Although notified that ''Your company will, of course, continue to be bound by the [union agreement] until it is terminated,'' Novick was obviously determined to continue avoiding the payment of fringe benefits.

2. Single employer and alter egos

It is well established that an employer's union agreement is binding on a nonunion employer in a double-breasted operation either if the two employers constitute a single employer and their aggregate employees constitute an appropriate bargaining unit, or if the employers are alter egos. *NLRB v. Al Bryant, Inc*., 711 F.2d 543, 550–554 (3d Cir. 1983).

Here, as indicated above, the union company (Design Drywall) and the two nonunion companies (Ideal Drywall and I.D. Drywall) all admit in their brief that they are a single integrated enterprise. And the evidence is clear that their employees constitute a single bargaining unit.

The same group of employees, working on Design's and later on I.D.'s jobs, were usually placed on Ideal's payroll to evade the payment of the contractual fringe benefits. On Design's union jobs, and sometimes on nonunion jobs, some of these employees were placed on the Design payroll and paid fringe benefits. Others, working alongside Design employees but placed on Ideal's payroll without fringe benefits, were doing the same type of work. (Tr. 36, 153, 159, 168, 183, 185, 191, 204–205, 211–213.) After Design was formed, neither Ideal nor I.D. had a separate group of employees working on its jobs. I.D. did not place the employees on its own payroll (Tr. 21, 74), and all the employees on Ideal's payroll were working on Design's or I.D.'s jobs (Tr. 132, 156). See *Naccarato Construction Co*., 233 NLRB 1394

fn. 2 (1977) (work of three companies' employees ''so intertwined'' that employerwide unit was appropriate).

The evidence is aso clear that the three companies were alter egos. Allen Novick, who managed the three companies from the same office, was president (the only officer) and owner of all the stock of both Design Drywall and I.D. Drywall. He was vice president and owner of 49 percent of the stock in Ideal Drywall, and his wife owned the remaining 51 percent and replaced him as president after Design was incorporated. (Tr. 6–9, 62.) All three companies, which were formed with the same business purpose of installing drywall in the construction industry, continued in that business except that after Design became a union company, Novick discontinued placing bids in Ideal's name and merely used its payroll for employees on Design's and I.D.'s jobs. Both Design and I.D. contracted for nonunion jobs in the same geographic area (Tr. 36). Both had the same supervision (President Novick and Foreman Pillow) and both used the same equipment (Design's truck and scaffold, Tr. 13, 222). I find that Design, Ideal, and I.D. have ''substantially identical management, business purpose, operation, equipment, customers, supervision and ownership.'' *NLRB v. Allcoast Transfer*, 780 F.2d 576, 579 (6th Cir. 1986).

3. Respondents' defenses

a. *Purported ''independent contractors''*

(1) Before June 1986

Despite the clear evidence to the contrary, the Respondents contend in their brief that their drywall hangers are independent contractors and not employees.

In support of this contention at the trial, President Novick was questioned at length (Tr. 83–102) by the Respondents' counsel about Ideal's drywall hangers in 1985 and early 1986, before he formed Design Drywall and hired a full-time foreman. This was long before the 10(b) limitation period, which began September 3, 1987 (6 months before the filing of the charge on March 3, 1988).

According to Novick, he then had practically no control over the Ideal workers. He claimed that he would select the crew leader, who would determine the size of the crew and pick the crew members, usually the leader's own helpers, half of whom the leader would pay $5 an hour. He claimed that ''Not generally'' did he have any say over who was in the crew. (Tr. 94–95.) ''I would write [the crew leader] a check [for 10 cents a square foot] and . . . he handled the rest.'' (Tr. 86, 91–92.)

Novick first claimed that he gave no instructions to the journeyman drywall carpenters, except to install the ''white side out,'' but then claimed: ''I just tell them they had to nail and glue it. Keep it as neat as possible.'' (Tr. 98.) He had no on-the-scene supervisor (Tr. 94). Upon completion of the job, ''I'd go by and inspect it . . . . Some of them you have to . . . check every single job'' because ''carpenters would hang everything you see and never mind the backs of the closets. They wouldn't hang it unless you inspected it.'' (Tr. 92–93.)

Novick testified that although ''A thousand times you tell them 'we need you here at 8,''' the ''builders start calling me at 8:30, 'you're not here''' (Tr. 95). He claimed that he had ''no control over it'' (Tr. 96) and testified (Tr. 96–97):

> Q. Would the crew have the power to decide when to stop work on a given day?
> A. Yeah.
> Q. Did they decide that through themselves?
> A. Half the time, anytime they mentioned a bar they did.

(Earlier he claimed, Tr. 22, 24, that ''they get there when they want,'' even ''in the middle of the night,'' and ''they leave when they want. . . . [Y]ou can't keep track of these people. They come and go as they please.'')

Novick claimed that most of the crews worked for him and somebody else at the same time and ''They'd work for another contractor in a minute'' if ''somebody offered them a half a cent more'' (Tr. 27). He claimed (Tr. 88):

> I would ask them to hang this room [for 10 cents a square foot]. They would say ''yes, we'll do it'' [or] ''no, we won't do it,'' they'd go out and look at the job and say ''Geez, it's over eight foot. I don't want to do it.'' Then they'd walk.

He positively testified, ''I never terminated anybody'' (Tr. 90).

He next testified (Tr. 102):

> Q. After Design was established, in about May of 1986, *did those arrangements* that you've described as applying to the Ideal workers *change*?
> A. *No*. [Emphasis added.]

Even assuming that Novick did operate Ideal Drywall in this manner, I find it obvious that his ''No'' answer was not truthful. The evidence clearly shows that such an operation did not exist after Novick incorporated Design Drywall, employed a full-time foreman on nonunion jobs, assigned a working foreman and paid union wages and benefits on union commercial jobs, employed regular crews of employees working months at a time, determined crew sizes, and transferred employees back and forth between Ideal and Design as discussed below.

(2) After September 3, 1987

By September 3, 1987 (when the 10(b) limitation period began and about 15 months after Novick adopted the union agreement for Design Drywall), most of Design's drywall installation was being performed by employees who worked regularly on the Design and Ideal payrolls for months (G.C. Exh. 30). The evidence also shows that these payrolls consist of both crew leaders and crew members (e.g., Carpenter and Sullins, Eric Livingston and Douglas Howell, and Robert Mills and Richard Eby, Tr. 198–200, G.C. Exh. 30) and that only a few crew leaders were then receiving extra pay to be divided with labor helpers (G.C. Exh. 30). (I agree with the General Counsel that the labor helpers were nonbargaining unit workers, lacking a community of interest with journeyman drywall carpenters.)

One crew leader who often worked with a labor helper was Dominic, the fast-working ''flier'' who acted as the foreman on at least one of Design's commercial jobs (Tr. 263). He and other Design employees were paid the contractual hourly rate on union jobs (Tr. 29, 106), and he worked a straight 40-hour week as a Design employee from March

through May 1987 (G.C. Exh. 30). Usually, however, he was paid at the piece rate of 10 cents a square foot for his crew, with his hours computed at 190 square feet an hour for his fringe benefits (Tr. 205). He and other employees working at the piece rate were not paid the contractual rate for overtime. Novick admitted (Tr. 96) that if the workers ''need a lot of money, they work a lot of hours.''

I find the evidence clear that during the limitation period, as well as at all the times after Design Drywall was established, President Novick retained the right to control the actual manner and means by which the work was done. Novick admitted that on the union commercial work, ''I demand them to be there at 8:00 o'clock''(Tr. 24); ''when I was working on commercial work for Design, I basically told them what we had to do'' (Tr. 26); ''they were working on a commercial job that I was controlling with a foreman'' (Tr. 28); they normally had ''a 40-hour workweek''; and ''they're working by the hour. You can't let them smoke dope in the basement like some of them did. . . . They don't punch a time clock, but they have a foreman there'' (Tr. 133–134). He further testified that he tried to check the commercial jobs everyday. ''Whatever problems you run into, you would have to stay and see and make sure that you got your guys lined up to do it, and told the foreman what was next. It would vary. You might be out there a half hour, and then you might be there for three hours. . . . I decided what men to put on them.'' (Tr. 186–187.)

When not answering questions by the Respondents' counsel regarding the business before Design was established, Novick made further admissions about his control over the drywall carpenters on both the Design and Ideal payrolls. He admitted he would make the determinations on hiring, discipline, crew sizes, transfers between companies, layoffs, and grievances (Tr. 17–19). Although he repeatedly denied ever terminating anybody (Tr. 19, 90), he later admitted (Tr. 191–192) that on the nonunion Green Pointe job (on which both Foreman Pillow and Dominic were working),

> I fired somebody off the job. The only guy I ever let go, but he punched one of my other men, and I couldn't tolerate it.

Then, recalling that he had denied ever discharging anybody, he changed his testimony (Tr. 192–193):

> That's the only guy that I ever—I really didn't fire him, I just told him I couldn't use him, that I didn't have any more work for him. He punched a guy and the superintendent didn't want him on the job.

The Respondents in their brief contend (R. Br. 6) that the work of these journeymen is routine and ''There is no instruction involved, other than identifying the locations of the building and the obvious fact that drywall must be hung with the 'white side out.''' They also contend (R. Br. 11) that there was no supervision on the residential work. They ignore the fact that Novick hired Foreman Pillow to supervise Design's jobs (most of which were residential) and that Novick admitted (Tr. 70): ''Glenn is my foreman . . . I did give him some bonuses out of I.D.,'' admitting that Pillow was supervising I.D.'s residential work as well. I discredit, as a fabrication, Novick's claim (Tr. 210) that ''Residential jobs can take care of themselves.''

The Respondents contend (R. Br. 6) that their ''drywall hangers, with the rarest exception, were truly sporatic workers''—relying on Novick's dubious testimony and ignoring the auditor's summary of their payroll records (G.C. Exh. 30) to the contrary. They also contend (R. Br. 8) that ''Each crew leader always worked with a crew of one or more helpers,'' ignoring the testimony that the names of crewmembers as well as crew leaders appear on the Design and Ideal payrolls and also ignoring the auditor's summary, showing that only a few of the drywall carpenters on the payrolls were receiving extra pay to be divided.

The Respondents also contend (R. Br. 9–11) that the pay arrangements point to an independent contractor finding. I note, however, that the pay arrangements on the commercial jobs (consisting of the contractual hourly wage rate and benefits) point to an employee finding. I find that the pay arrangements are not determinative.

As the General Counsel points out, ''The Board uses the common law right-of-control test to determine whether individuals are employees or independent contractors.'' *Precision Bulk Transport*, 279 NLRB 437 (1986). Having found that President Novick retained the right to control the actual manner and means by which the drywall carpenters perform the work, I find that they are employees.

I therefore reject the Respondents' defense that the drywall carpenters are independent contractors.

b. *Unsigned union agreements*

The Respondents contend (R. Br. 19–26) that none of them signed the union agreements and therefore payment of the fringe benefits to the Union is prohibited by Section 302 of the Act.

I reject this contention as frivolous. President Novick, for Design Drywall, joined M.C.C.A. and signed a power of attorney, appointing the employer association as Design's agent to sign collective-bargaining agreements with the Union. M.C.C.A. did sign the union agreements (G.C. Exhs. 15, 16), which in article 5H incorporate by reference the detailed basis for fringe benefits to be paid. Compare *Merrimen v. Paul F. Rost Electric*, 861 F.2d 135, 136 (6th Cir. 1988), in which an employer member of an association failed to sign the required letter of assent.

c. *Lack of majority status*

The Respondents argue in their brief (R. Br. 26–29) that ''the imposition of contract obligations is contingent upon the union's possession of majority support.''

The Board rejected such a contention in *Consumers Asphalt Co*., 295 NLRB 749 (1989), in which an employer similarly ''transferred employees from its payroll to that of its alter ego . . . to evade obligations under the 8(f) prehire agreement'' with the union, and the employers ''repudiated the collective-bargaining agreement then in effect by virtue of the 8(f) relationship.'' The Board specifically held:

> We disagree with the [employers'] contention that their agreement with the [union] could be repudiated at will because of an inadequate showing of majority support. That argument is premised on the continued application of the conversion doctrine, which [*John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988)] abolished.

Here, as in *Deklewa*, Design Drywall ''voluntarily entered into a Section 8(f) relationship with the Union [through its power of attorney to M.C.C.A., adopting the union contract]. This contract was binding, enforceable, and not subject to unilateral repudiation by [the employer].''

4. Respondents bound by union agreement

After weighing all the evidence, I find that both Ideal Drywall and I.D. Drywall are bound by the terms of Design Drywall's union agreement, first as a single employer and second as alter egos.

Single employer. In view of the admission that all three companies are a single employer and the finding that their employees constitute a single bargaining unit, I find that when President Novick paid employees on Design jobs with Ideal checks and when he contracted jobs under the name I.D. Drywall instead of Design Drywall, he was acting on behalf of a single employer that was bound by the obligations under the union agreement.

The Board held in *Deklewa*, 282 NLRB at 1377, that in such 8(f) cases, ''the appropriate unit normally will be the single employer's employees covered by the agreement.'' I therefore find that the appropriate unit is

> All drywall carpenters employed by Design Drywall, Ideal Drywall, and I.D. Drywall, excluding all other employees and supervisors as defined in the Act.

Alter egos. It is well established, as the court held in *Carpenters Local 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 508 (5th Cir. 1982):

> [T]he focus of the alter ego doctrine, unlike that of the single employer doctrine, is on the existence of a disguised continuance or an attempt to avoid the obligations of a collective bargaining agreement through a sham transaction or technical change in operations. [Emphasis added.]

I find that Novick's paying employees on Design Drywall jobs with Ideal Drywall checks was ''an attempt to avoid the obligations'' of the union agreement ''through a sham transaction'' and that I.D. Drywall was merely a ''disguised continuance'' of Design Drywall. I therefore find that, as alter egos of Design Drywall, both Ideal Drywall and I.D. Drywall are bound by the obligations under Design Drywall's union agreement.

5. Concluding findings

While enjoying the benefits of an 8(f) prehire agreement, enabling President Novick to submit Design Drywall bids on both union and nonunion jobs, Novick unilaterally modified the terms of the union agreement. Without notice to the Union, he placed Design Drywall employees on the nonunion Ideal Drywall payroll, and later contracted under the name I.D. Drywall to evade the contractual obligation to pay all employees fringe benefits. He further repudiated the terms of the union agreement by paying the residential wage rate and fringe benefits instead of the higher commercial wage rate and fringe benefits on commercial construction.

I find that the Respondents, by repudiating the terms of the union agreement in this manner, engaged in a fundamental abrogation of their bargaining obligation. As the court observed in *NLRB v. Al Bryant, Inc*., above, 711 F.2d at 552, in a somewhat similar situation:

> Where the same employees can be and are, as in this case, switched back and forth between a union and nonunion payroll, the benefits which the employees reap from the union's collective bargaining can be diluted or dissipated.

Under these circumstances I find that Design Drywall, Ideal Drywall, and I.D. Drywall, which are found to be a single employer with employees in a single unit and to be alter egos, ''repudiated the collective-bargaining agreement then in effect by virtue of the 8(f) relationship, violating Section 8(a)(5) and (1) of the Act.'' *Consumers Asphalt Co*., above.

The agreement in effect on September 3, 1987 (the beginning of the 10(b) limitation period) was the 1987–1988 M.C.C.A.-union agreement (G.C. Exh. 16). Under the *Deklewa* principles, it was ''binding, enforceable, and not subject to unilateral repudiation'' until its ''expiration,'' when the Union would ''enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.'' *Deklewa*, 282 NLRB at 1377–1378, 1389.

Because of the Union's March 25, 1988 notice to Design Drywall (G.C. Exh. 2C) that M.C.C.A. was ''withdrawing its authority to act as your collective bargaining representative,'' I find that M.C.C.A. was not representing the Respondents in the 1988 negotiations and that their obligations under the 1897–1988 agreement terminated on its August 1, 1988 expiration date.

B. *Refusal to Submit Records*

Until December 1, 1987, Novick succeeded in concealing from the Union the fact that he was paying employees on various Design Drywall jobs with Ideal Drywall checks. That was when Union Representative Thomas Cameron visited the Design job at the Meadowbrook Apartments project in Rochester. Drywall employee Keith Hedger informed Cameron that he sometimes worked for Design and sometimes for Ideal. Hedger also complained that he was not getting any fringe benefits, which he needed because his wife was pregnant. (Tr. 281–284.)

On December 15, 1987, the union auditors requested Design Drywall to furnish records necessary to perform an audit, to determine if there were delinquent fringe benefits and if employees were being shifted from one company to another (G.C. Exh. 24, Tr. 307). At the scheduled audit on January 20, 1988, the union auditor was furnished only Design's check registers (Tr. 307, 309).

Upon auditing the check registers and finding the large number of checks from Design Drywall to Ideal Drywall, the auditor was told that Ideal's records were not available, ''I'd have to talk to Al [Novick]'' (Tr. 317). The next day the auditor informed Novick of shortages in Design's fringe benefit payments and then asked him for Ideal's records. Novick refused to produce them, falsely stating ''that he didn't have any part to do with Ideal.'' (Tr. 317–318.) To the contrary, Novick was making the decisions when to place employees on the Ideal payroll (Tr. 17–18), was transferring funds from Design to Ideal to cover the payroll, and was then the vice

president of Ideal (Tr. 8), having been replaced by his wife as president (Tr. 62).

Although Novick permitted an audit of Ideal's records nearly 6 months later on July 12, 1988 (as his lawyer advised, after the charge was filed, Tr. 334), I find that the Respondents' refusal on January 21, 1988, to provide the Union with the relevant and necessary Ideal records for an audit was unlawful. As the Board held in *Consumers Asphalt Co*., above at 750, ''the [unions] were unlawfully denied their request for an audit of the [employers'] payroll records to verify the [employers'] compliance with the . . . contract to which they were bound under [*John Deklewa & Sons*, 282 NLRB 1375 (1987).]''

I therefore find that the refusal violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondents are a single employer, whose employees constitute a single bargaining unit, and are alter egos.

2. The Respondents were bound by the 1987–1988 M.C.C.A.-union agreement as an 8(f) prehire agreement.

3. All drywall carpenters employed by Design Drywall, Ideal Drywall, and I.D. Drywall, excluding all other employees and supervisors as defined in the Act, constitute an appropriate bargaining unit.

4. By unilaterally modifying the terms of the collective-bargaining agreement with the Union and repudiating their obligation to pay fringe benefits on residential projects and the contractual wage rate and fringe benefits on commercial projects, the Respondents have engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

5. By refusing to provide the Union with relevant and necessary records for an audit to determine compliance with obligations to make fringe benefit contributions, the Respondents further violated Section 8(a)(5) and (1).

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents, as found, have unilaterally modified the terms of the 1987–1988 M.C.C.A. agreement with the Union, having repudiated their obligation under that 8(f) prehire agreement to make contributions on residential projects for fringe benefits (consisting of health and welfare insurance, vacations and holidays, pension, and apprenticeship and training) and to pay employees on commercial construction the contractual wage rate and fringe benefits.

I therefore find that the Respondents, for the period from September 3, 1987 (the beginning of the 10(b) limitation period), through August 1, 1988 (the expiration date of the agreement), must make the employees whole for unpaid wages and reimburse them for any expenses ensuing from the failure to make the fringe benefit contributions, *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1986), enfd. mem. 661 F.2d 940 (9th Cir. 1981), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondents, for the same period, must also make the withheld fringe benefit contributions to the benefit funds, plus the contractual mandatory liquidated damages for delinquent contributions, *American Thoro-Clean*, 283 NLRB 1107, 1109 (1987). Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. Any additional amount owed the fringe benefit funds shall be determined in accordance with *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondents, Design Drywall Ltd., Inc., I.D. Drywall Ltd., Inc., and Ideal Drywall Company, Dearborn Heights, Michigan, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to pay the fringe benefits on residential projects and the contractual wage rate and fringe benefits on commercial projects as required by the 1987–1988 collective-bargaining agreement between M.C.C.A. and the Carpenters District Council of Detroit, AFL–CIO during the period from September 3, 1987, until the expiration of the agreement on August 1, 1988.

(b) Refusing to furnish relevant and necessary records requested by the Union for an audit to determine compliance with the agreement.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Transmit the unpaid fringe benefits to the Union's benefit funds, plus the contractual liquidated damages, and make whole the employees in the following appropriate unit by paying their unpaid wages and reimbursing them for any expenses ensuing from the failure to pay the fringe benefits, plus interest, in the manner set forth in the remedy section of the decision:

> All drywall carpenters employed by Design Drywall, Ideal Drywall, and I.D. Drywall, excluding all other employees and supervisors as defined in the Act.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of payments due under the terms of this Order.

(c) Post at their Taylor, Michigan office and at all their construction sites during the posting period copies of the attached notice marked ''Appendix.''[2] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representative,

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.